88-1622

No. _____

Supreme Court, U.S.
FILED
MAR 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RICHARD L. MITCHELL, JR.,

Petitioner,

V.

THE BOARD OF TRUSTEES OF THE LOS ANGELES COMMUNITY COLLEGE DISTRICT, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD L. MITCHELL, JR.
1282 Redondo Boulevard
Los Angeles, CA 90019
(213) 936-9215

Petitioner in Propria Persona

113pp

QUESTIONS PRESENTED FOR REVIEW

1. Under California law, whether California public schools, the Los Angeles and California community college districts, their officials and employees, are state entities that possesses Eleventh Amendment immunity from damages, declaratory and injunctive relief, especially when (1) there exists conflict in state and federal laws and (2) when officials are sued in both their individual and official capaciticies for violating clearly established constitutional and statutory rights?

2. Does a Federal court of appeals, in reviewing a district court's Findings of Fact and Conclusions of Law, enunciated under Anderson v. Liberty Lobby, Inc., 447 U.S. 242 (1986) and Anderson v. Bessemer City, 470 U.S. 564 (1985), or other applicable standards, have discretion to

avoid petitioner's evidence of explicit errors cited, when such errors are clear and pivotal to decision reviewed? And, (2) did court of appeals exceed its jurisdiction by making findings on dispositive issues of facts and law where such issues were not addressed by the district court?

3. Was matter of timeliness properly invoked by respondents** and appropriately considered by lower courts where evidence reveals (1) procedural errors committed by EEOC and (2) court of appeals ruled petitioner's retaliation claim barred while pending review by EEOC?

4. Under Int'l Brotherhood of Tms. v U.S. 431 U.S. 324, 361-62 [n50] (1977), whether petitioner* is entitled to a presumption that his denial of employment was based on impermissible consideration, where a pattern of discrimi-

nation had been established? If so, is this evidence sufficient to create (a) a prima facie case of disparate treatment, and (b) prima facie case of disparate impact?

PARTIES TO THIS ACTION ARE:

Petitioner,* Richard L. Mitchell, Jr. - Respondents,** BOARD OF TRUSTEES OF THE LOS ANGELES COMMUNITY COLLEGE DISTRICT; Leslie Koltai, individually and as Chancellor; William Spaeter, individually and as Vice Chancellor, Personnel Services; Virginia F. Mulrooney, individually and as Vice Chancellor, Personnel Services; Kenneth S. Washington, individually and as Vice Chancellor, Educational Services; Catherine Close, individually and as Staff Counsel, California Community Colleges; Ernestine J. Palmer, individually and as Director, Office of Affirmative Action Programs and Services; Walter C. McIntosh, individually and as President, Los Angeles Southwest College; and Rodney L. Patterson, individually and as Director, Office of Affirmative Action Programs and Services.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i-iii
THE PARTIES	iii
TABLE OF AUTHORITIES	ix-xi
OPINIONS BELOW	1-2
JURISDICTION	2-4
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4-9
STATEMENT OF THE CASE	9-11
A. Summary of Pertinent Facts	9-11
B. Proceedings Below	
REASONS FOR GRANTING WRIT	11-26
A. The Decision Appealed From Directly Conflict With Applicable Decision Of This Court	11-22
B. The Decision Appealed From Directly Conflict With Applicable Decision Of The California Supreme Court	22-24
CONCLUSION	24-26

APPENDICES

PAGE

Unpublished Ninth Circuit's Memorandum decision, affirming district court's grant summary judgment in favor of Respondents, dated August 17, 1988 (decision appealed from) A-1

District court's Findings of Fact and Conclusions of Law, dated September 29, 1987 ..... B-1

Order and Opinion resignated by Ninth Circuit as published upon request by Appellees' attorney, dated November 10, 1988, 88 Daily Journal D.A.R. 14092 ..... C-1

DUE TO THE VOLUMINOSITY OF EVIDENCE APPENDICES D THROUGH W ARE PROVIDED IN A SEPARATE VOLUME

Order by District Court denying Petitioner's motion to remand action to state court, dated September 29, 1986 ..... D-1

Order by Ninth Circuit dismissing Petitioner's appeal of a 60(b) motion for lack of jurisdiction, dated November 21, 1987 ..... E-1

Order by Ninth Circuit denying Petitioner's request to depublish, dated January 3, 1989 F-1

PAGE

Order and Amended Opinion by Ninth Circuit, dated January 11, 1989 ..... G-1

Investigative Findings by OCR, dated, April 14, 1986 ..... H-1

Reporter's transcript of District Court's granting Petitioner's motion for leave to file an amended complaint, dated January 12, 1987 ..... I-1

Reporter's transcript regarding Appellee's Catherine Close motion to dismiss or for summary judgment, dated March 23, 1987 ..... J-1

Reporter's transcript regarding Appellee's Catherine Close motion to set aside the default and denial of summary judgment for all Respondents, dated April 27, 1987 .. K-1

Judgment entered and filed by District Court on September 29, 1987 (Judgment appealed from) L-1

Order by Ninth Circuit denying Petitioner's petition for rehearing and rehearing en banc re Ninth Circuit's ruling that his 60(b) appeal was not a final judgment under § 1291 ..... M-1

PAGE

Order by Ninth Circuit denying Petitioner's petition for rehearing of their unpublished Memorandum decision of 8-17-87, dated October 13, 1988 ..... N-1

Order by this Court granting Petitioner's petition for leave for an extension to file a petition for writ of certiorari, dated February 10, 1989 ..... O-1

Letter from the Clerk's office of this Court returning a copy of Petitioner's petition for writ of certiorari, dated February 14, 1989 ..... P-1

Letter from the Clerk's office of this Court returning Petitioner's petitons for writ of certiorari pursuant to Rules 28.2 and 33 of this Court, dated February 14, 1989 ..... Q-1

Letter from the Clerk's office of this Court notifying Petitioner he had not complied with Rules 28.2 and 33 of this Court, dated March 6, 1989 ..... R-1

Respondents' request that Ninth Circuit publish its August 17, 1987 Memorandum decision, dated September 14, 1988, w/six letters of support S-1

PAGE

Petitioner's request that Ninth Circuit de-publish its November 10, 1988 redesignated Opinion, dated, November 18, 1988 ..... T-1

Inter-office Correspondence from Ms. Deweylene D. Henry, notify-administrative staff of her awareness of a bias interview committee assembled to conduct the interview for position vacancy of Senior Director, Occupational & Technical Education, dated December 2,1983.. U-1

Declaration of Ms. Deweylene D. Henry in support of Petitioner's opposition to Respondents' motion for summary judgment, dated February 17, 1987 ..... V-1

Inter-office Correspondence from Respondents' Affirmative Action Officer notifying Respondents' administrative staff of OCR pending investigation, dated sometimes in September, 1985 .. W-1

TABLE OF AUTHORITIES

CASES

PAGE

Anderson v. Bessemer City, 470 U.S. 564 (1985) i

Anderson v. Liberty Lobby, Inc., 447 U.S. 242 (1986) i

Gonzalez v. State of California, 154 Cal. 716, 728-29 (1908) 23

Jackson v. Hayakawa, 605 F.2d 1121 (9th Cir. 1979) 15

First National Bank v. State of CA. 197 Cal.App.3d 627; __Cal.Rptr. ___(Dec. 1987) 22

Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) 15,16

Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) 20

Roberts v. College of the Desert, 861 F.2d 1166, 1167 (9th Cir.1988) 20,21

Stones v. Los Angeles Community College District, 796 F.2d 270 (9th Cir. 1986) 13,19

Stones v. Los Angeles Community College District, 572 F.Supp. 1072 1077 (C.D. 1983) 19

Union Trust Co. v. State of California, 154 Cal. 716, 728-729 (1908) 23

CONSTITUTION OF THE UNITED STATES

The Supremacy Clause 4

Fourteenth Amendment 4

Eleventh Amendment 5

STATUTES

18 U.S.C. § 1001 5

28 U.S.C. § 1441(c) 5-6

29 U.S.C. §§ 621-34 6

42 U.S.C. § 1981 6

42 U.S.C. § 1983 6

42 U.S.C. § 1985 7

42 U.S.C. § 2000e et seq..... 7

California Code of Civil Procedure
§ 340(1) 7-8

California Code of Civil Procedure
§ 340(3) 8

California Government Code
§ 12900 et seq..... 8-9

California Government Code
§ 11135 9

OTHER

California Community College Report
on Enrollment, Research and
Analysis Unit. Report No. 88-6,

July, 1988 18-19

California Department of Education
Enrollment Report, (ISBN-0-8011-
0757-1), Sacrament, CA, 1988.... 18-19

No. _____

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OCTOBER TERM, 1989

RICHARD L. MITCHELL, JR.,

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vs.

THE BOARD OF TRUSTEES OF THE LOS ANGELES COMMUNITY COLLEGE DISTRICT, et al.,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

Petitioner Richard L. Mitchell, Jr., respectfully prays that a writ of certiorari issue to review the unpublished Memorandum decision of the Ninth Circuit court of appeals, affirming the district court's grant of summary judg-

ment in favor of respondents, which is attached hereto as Appendix A-1, entered August 17, 1988; the district court's Findings of Fact and Conclusions of law, whis is shown as Appendix B-1, entered September 29, 1987, and judgment appealed from, also entered on September 29, 1987, attached as Appendix L-1. Order and redesignated opinion entered in the Daily Journal on November 10, 1988, attached as Appendix C-1; order and amended opinion entered January 11, 1989, attached as Appendix G-1.

JURISDICTION

The Memorandum decision of the court of appeals was entered on August 17, 1988. A timely petition for rehearing was filed on August 29, 1988 and denied on October 13, 1988. A timely request to de-publish was filed on September 26, 1988 and a responsive pleading filed on November 7,

1988, and denied on January 3, 1989. The Ninth Circuit entered an additional order and amended opinion on January 11, 1989. A timely petition for leave for an extension to docket his Petition for a writ of certiorari was made by the petitioner on November 29, 1988 to this Court which was granted December 6, 1988, which included to February 10, 1989.

Petitioner timely filed his petition granted by this Court on December 6, 1988. However, those petitions for a writ were returned on February 14, 1989, to the petitioner due to petitioner's failure to comply with Rules 25.2 and 33 of this Court. Petitioner filed a petition for rehearing with this Court, pursuant to Rule 51.1 of this Court. However, it was determined that the petitioner had further failed to comply with Rules 25.2

and 33 of this Court, those briefs, too, were returned to him. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional and Statutory Provisions involved in this case are as follows:

1. Constitution of the United States.

A. The Supremacy Clause, which provides:

> "This Constitution, and laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the judges in every state shall be bound thereby; anything in the Constitution or Laws of any State to the contrary notwithstanding."

B. Fourteenth Amendment to the United States Constitution:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty...without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

C. Eleventh Amendment to the Constitution:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

2. Statutes of the United States.

A. 18 U.S.C. § 1001:

"Whoever, in any matter within the jurisdiction of any department of agency of the United States knowingly and willfully falsifies, conceals or cover up by any trick, scheme, or device a material fact or makes any false, fictious or fraudulent statements or representations, or makes any uses of any false writing or document knowing the same to contain any false, fictious or fraaudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

B. 28 U.S.C. § 1441(c):

"Whenever a separate and independent claim or cause of action, which would be removable if sued alone, is joined with one or more otherwise non-removable claims or causes of action, the entire action may be removed and the district court may determine all issues therein..."

C. 29 U,S.C. §§ 621-34:

"To fail or refuse to hire....any individual or otherwise discriminate against any individual with respect to his compensation, ... or age".

D. 42 U.S.C. § 1981:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts...and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."

E. 42 U.S.C. § 1983:

"Every person who under color of state of any statute, ordinance, regulation, custom, or usage, of any state...subjects, or causes to be subjected, any citizen of the United States or other person within jurisdiction thereof to

the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

F. 42 U.S.C. § 1985:

"(3) If two or more persons in any State or Territory conspire...for the purpose of depriving, either directly or indirectly, any person ...of the equal protection of the laws, or of equal privileges... under the law...the party so injured or deprived may have an action for the recovery of damages... against any one or more of the conspirators."

G. 42 U.S.C. §.2000e, et seq.:

"2(a) It shall be an unlawful employment practice for an employer:

(1) to fail or refuse to hire... any individual with respect to his compensation, terms, conditions, or privileges of employment, becaause of such individual's race, color, religion, sex, or national origin."

3. California Code of Civil Procedure

A. § 340(1) One year limit - Penalty, Forefeiture to individual,

State Torts, Within one year:

"(1) An action upon a statute for a penalty or forfeiture, when the action is given an individual, or to an individual and the state, except when the statute imposing it imposing it prescribes a different limitation.

(3) An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositer against a bank for the payment of a forged or raised check; or a check that bears a forged or unauthorized endorsement, or against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in Section 4826 of the Business and Professional Code, for such person's neglect resulting in injury or death to an animal or fowl in the course of boarding or feeding such animal or fowl or in the course of the practice of veterinary medicine on such animal or fowl."

4. California Government Code § 12900 et seq:

A. § 12940. "It shall be an unlawful employment practice, un-

less based upon a bona fide occupational qualification, or except where based upon applicable security regulation established by the United States or the State of California:

(a) for an employer, because of the race...or sex of any person, to refuse to hire or employ the person...or discriminate against in ...term ...or privileges of employment."

B. § 11135. "No person in the State of California shall, on the basis of ethnic identification, religion, age, sex...be unlawfully denied the benefits of, or be unlawfully subjected to discrimination under any program or activity that is funded directly by the state or receives any financial assistance from the state."

STATEMENT OF THE CASE

A. Summary of Pertinent Facts

In its last order and amended opinion, entered January 11, 1989, the Ninth Circuit Court of Appeals summarized the pertinent facts in its decision affirthe district court's grant of summary judgment in favor of Respondents in the

below following statement from that decision:

"Affirming a grant of summary judgment the court held that a college district is a state entity possessing eleventh amendment immunity from 42 U.S. C. §§ 1981, 1983, and 1985 claims for damages and for injunctive relief.

Plaintiff-appellant Richard Mitchell appeals from the district court's grant of summary judgment to the defendants. Mitchell brought a complaint alleging employment discrimination based on age, sex and race against the defendants community college district's decision to hire someone else for the position of Senior Director. The complaint raised claims under 42 U.S.C. §§ 1981, 1983, and 1985; 29 U.S.C. §§ 621-34; 42 U.S.C. §§ 2000e-2000e-17; for declaratory and injunctive relief and pendent state claims.

The district court found that the appellant's 1981, 1983 and 1985 claims, as well as his ADEA and Title VII claims, were barred by the statute of limitations. Alternatively, the court found that the apellant had failed to raise a genuine issue of material fact to support his allegations of discrimination. The court also found that the defendant Los Angeles Community College District and the individual defendants enjoyed eleventh amendment immunity

from damages of injunctive relief. Further, the court held that the plaintiff's state based constitutional and statutory claims were time barred under California. Because Californid state colleges and universities are dependent instrumentalities of the state, the district is a state entity that possesses eleventh amendment immunity from the appellant's section 1981, 1983 and 1985 claims in damages and for injunctive relief.

Likewise, the individual defendants share in the district's eleventh amendment immunity because they were sued in their official capacities." (See Appendix G-1 thru G-5).

REASON FOR GRANTING THE WRIT

A. The Decision Appealed From Directly Conflict With Applicable Decision Of This Court

As shown in its unpublished Memorandum decision (A-13/14) and in its published opinion (C-14), this case was summarily decided on the issue of under California law, whether California public schools, the Los Angeles and California community college districts, their officials and

employees, are state entities that possesses Eleventh Amendment immunity from damages, declarative and injunctive relief? In pursuading the Ninth Circuit to publish its Memorandum decision, Respondents' attorney garnered support of other attorneys actively practicing law throughout the state of California and affirmed the issue at hand by stating:

> "A published opinion by the court would clarify the status of the law with respect to the availabilityof Eleventh Amendment immunuty to California's schools and community college districts. The Memorandum decision is a well reasoned and scholarly analysis of the issue of whether community colleges in California are agencies of the state and thereby entitled to share in the State's immunity from suit under the Eleventh Amendment. This issue is litigated in virtually every civil rights suit filed against school and community college districts in California. This is ambly demonstrated by the enclosed letters in support of publication". (See Appendix S-1 attached).

And in one letter of support, attorney Peter C. Carton of the Schools Legal Service provides some of the following testimony in support of this issue:

> "...Our office represents over 100 California school districts, including six community colleges. The subject Memorandum opinion at long last resolves a fundamental constitutional law question hanging over the heads of our clients, and we would like to see firm establishment of precedent by formal publication.
>
> In 1986, your Court did not reach the question now resolved. In Stones v. LACCD, (1986) 796 F.2d 270, 272, the Court left hanging the question of whether community colleges are California's political subdivisions and thus covered by Eleventh Amendment immunities. As such, your decision clarifies the holding in Monell v. N.Y. City Dept. of Soc. Services, (1978) 436, 98 S.Ct. 2018. This Memorandum resolves and announces an important rule of law, an issue of substantial legal importance." (See Appendix S-5/6 attached).

A similar letter in support provides another compelling reason why this petition for a writ should be granted. That

convincing testimony for publication came from the General Counsel of School and College Legal Services of Sonoma County Office of Education, attorney Robert J. Henry. Attorney Henry provides in part:

> "This office represents 45 public school and college districts in California. In that capacity this office urges your office to seek publication of the Ninth Circuit Court of Ap0eals' decision in Mitchell v. LACCD. The specific conclusion as to 11th amendment immunity arises in nearly all section 1983 cases involving community colleges in California. In fact, I litigated this point for over one year in the Stewart v. Sonoma County Community College District case...Needless to say, the Mitchell decision would have saved both sides a lot of time and our respective clients some substantial fees." (See Appendix S-9 attached).

The above are only three vital reasons why this Court should grant this petition request; other equally compelling testimony in support of convincing the Ninth Circuit Court of Appeals to publish its initial unpublished Memorandum decision

of August 17, 1988, are shown in Appendix S attached hereto. There nonetheless exists direct conflict in the Ninth Circuit ruling on the Eleventh Amendment issue and this Court's holding on the same. In its ruling, the Ninth Circuit held:

> "...the individual defendant share in the district's eleventh amendment immunity because they were sued in their official capacities. Such suits"are in essence, actions against the governmental entity of which the officer is an agent." Hayakawa, 682 F.2d 1350; see Monell v. New York City Dept. of Social Servs. 436 U.S. 658, 690 n.55 (1978)." (See Appendix A-14 attached).

However, in Monell, supra, at 690, nos. 54, this Court held:

> "Our holding today is, of course, limited to local government units which are not considered part of the State for Eleventh Amendment purposes."

The Ninth Circuit issued its decisions and redesignated its unpublished Memorandum decision (A-1) as a published opin-

ion (G-1) on ground that California community colleges are considered state entities for Eleventh Amendment purposes, which flies in the face of this ruling.

The Ninth Circuit in error ruled that "...the individual defendants shaare in the district's eleventh amendment immunity· because they were sued in their official capacities." (A-14). Although, there has never been rasied the question by Respondents' attorney during these proceedings, regarding whether the Respondents were being sued in their official or individual capacities, due to the fact that all of covers of the pleadings clearly show that the Respondents were being sued in their individual and official capacities. (See p. iii). However, this Court ruled in Monell, supra, at 690, n.55, that "...local government can be sued under § 1983" and that "local

governmental officials sued in their official capacities are 'persons' under § 1983 in those cases in which ...a local government would be suable in its own name."

This case presents a serious public interest problem, that was in error and summarily decided that the "Eleventh Amendment Immunity Protects School District from Discrimination Suit." (See Appendix C-1). This case directly adversely affect the lives of over 500,000 officials and employees presently earning a salary from California's 7,125 public schools and its 106 community college districts. 1/

1/ Total Number of Officiala and Employees Working in California's 7,125 public schools and 106 community college districts

California Public Schools' Officials & Employees (Cont'd)

This landmark decision was made in error and where the economic survival of litigants throughout the state of California, seeking to find relief on this critical issue, will certainly find confusion and disappointment in the existing conflict in this Court's ruling and that of the Ninth Circuit ruling. Until the Ninth Circuit's

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1/ (Cont'd)

Total Number of Officials and Employees Work-in California's Public Schools.

Administrators (certificated, fulltime)	16,031
Pupil Personnel Srvs: (Nurses, counls.	15,204
Faculty	189,564
Administrators (classified, fulltime)	114,204
Classified (non-administrative, Prt)	102,208
Total	437,211

Total Number of Community College Officials and Employees

Administrators (certificated, fulltime)	1,624
Administrators (classified, fulltime)	648
Faculty and other employees	61,035
	63,307

Source: "Report on Enrollment", Fall, 1987. California Community Colleges, Report No. 88-6, Research & Analysis Unit. Report No. 88-6, July, 1988. And California (Cont'd)

decision in the instant case, no California court has ever ruled on the Eleventh Amendment immunity issue for California public schools and community colleges. This is noted in Stones v. LACCD, 572 F.Supp. 1072, 1077 (C.D. 1983) regarding the noted silence on the community colleges, wherein it was stated:

> "Neither the state nor the federal courts have ruled on the Eleventh Amendment status of the state's community college system."

On that same issue in the same case the Ninth Circuit remained silence by ruling in Stones v. LACCD, 796 F.2d 270, 272 (9th Cir. 1986):

"...If the District is properly char-

1/ (Source, cont'd from previous page

Department of Education, Sacramento, CA (ISBN-0-8011-0757-1), 1988. There are a total of 4,488,399 students enrolled in California public schools.

> acterized as an arm of the state, Dr. Stones suit to enjoin it would be also barred... However, we need not reach the Eleventh Amendment question on this record...we need not decide the theoritical..and, we note, quite difficult—question whether judgment against the District would violate the Eleventh Amendment." (At 272).

The Eleventh Amendment immunity issue for California community colleges was again evaded in its most recent case in Roberts v. College of the Desert, 861 F.2d 1166, 1167 (9th Cir. 1988), which was decided only 21 days subsequently to the instant case. The Ninth Circuit remained silence again, in that ruling by stating:

> "The central factor in this inquiry is "whether the named defendant has such independent status that a judgment against the defendant would not impact the state treasury." (at 1167)..."We decline this question, believing that it is one for the district court to determine in the first instance, coincident with the development of an appropriate factual record. See Patsy v. Florida Bd. of Regents, 457 U.S. 496, 515 n.19, 102 S.Ct. 2557, 2567 n.19, 102 S.Ct. 2557 n.19, 73 L.Ed.2d 172 (1982).

And, as recent as March 15, 1989, in Roberts, supra, in an Order and Amended Opinion, when it had a clear opportunity to rely in support of the issue of the Eleventh Amendment immunity question the instant case, it again referred the issue back to the district court. The Ninth Circuit, in a revolving door procedure, again, stated:

> "We decline to decide this question believing that it is one for the district court to determine in the first instance, coincident with the development of an appropriate factual re-record." (See 89 Daily Journal D.A.R. 3339, 3341, n.II, Daily Appellate Journal, Thursday, March 16, 1989.

The relevant question appears, why did not the Ninth Circuit rely upon the instant case as guidance to resolve the immunity issue in its ruling in Roberts, supra?

Clearly the jury will remain out on that question; however, only this Court can put to rest the identifiable conflict and

skirting of the issue by the Ninth Circuit and the district courts of this Circuit. The necessity for resolving this conflict is obvious, and only this Court can do that.

B. The Decision Appealed From Directly Conflict With Applicable Decision Of The California Supreme Court

Against evidence which Petitioner provided the Ninth Circuit Court of Appeals, showing that under First National Bank v. State of California, 197 Cal.App.3d 627;___Cal.Rptr.____ (Dec. 1987) was in conflict with their ruling, they rejected this ruling and ordered their Memorandum decision published. In Petitioner's request for the Ninth Circuit to de-publish its Order and Opinion dated November 10, 1988 (C-1), which was denied on January 3, 1989 (F-1), the California Supreme

Court ruled:

> "..the fact that a state agency is created by statue to discharge a duty constitutionally imposed on the state does not transmit the agency into 'the state' nor render the state liable for its acts under a general theory of respondeat superior. (Union Trust Co. v. State of California (1908) 154 Cal. 716, 728-729 [99 P. 183]; Gonzalez v. State of California, supra, at p. 090 [105 Cal.Rptr. 804]). The authority of an agency like a school district is measured by the authority statutorily conferred upon its governing board. A agency may not act on behalf of the state, nor may the state perform a task delegated to the agency, unless statutorily authorized to do so." (At 634)..."The statute clearly is not intended to protect against a district's default on a financing agreement." (At 637). (See Appendix T-1, p. 5)

The Ninth Circuit of Appeals, in a stunning and schocking department from explicit facts and case law, completely ignored the above cited conflict by publishing its Memorandum decision and steadfastly affirming the district court grant of summary judgment in favor

of Respondents. These are critical issues of national concern which can only be resolved by this Court

CONCLUSION

This Petition involves four questions of federal jurisdiction, upon which, for each question, there exist a con/lict in decisions among the Ninth Circuit Court of Appeals. Since this action was summarily disposed of on the Eleventh Amendment immunity question, the Petitioner has singularly addressed that question; however, he has provided evidence showing conflict addressing other issues raised by the Ninth Circuit in their decisions.

As demonstrated in this writ, the conflict is neither subtle nor unknown, but have reached the point where the Ninth Circuit Court of Appeals have become expressly critical of each other's views.

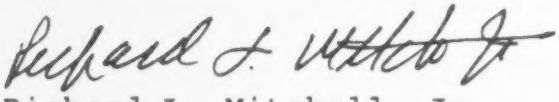
The result of the existing conflict

provides no legal guidance nor direction for those seeking relief regarding the status of public school and community college districts officials and employees concerning Eleventh Amendment immunity availability. The extent and status of this issue remains in choas at this writing. The importance of this issue is best demonstrated by supportive letters of attorneys practicing law for educational institutions throughout the state of California, as shown in Appendix S attached herein.

Given these conflicts, therefore, which goes to the heart of an area as important as federal jurisdiction, and the fact that the conflicts result from a difference in opinion between state and federal law, only this Court can resolve this issue to ensure that the con-

cept of federal jurisdiction will be uniform throughout this circuit. For the above reasons, Petitioner respectfully request that this petition for a writ of certiorari be granted for review.

Respectfully submitted,



Richard L. Mitchell, Jr.

Petitioner in Propria Persona

APPENDIX A-1

FILED AUG 17, 1988
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD L. MITCHELL, JR.,	)C.A. No.
	)87-6553
Plaintiff-Appellant,	)87-6618
	)
vs.	)D.C. No.
	)CV-86-
LOS ANGELES COMMUNITY COLLEGE	)5105 WMB
DISTRICT; LESLIE KOLTAI; VIRGINIA	)
F. MULROONEY; KENNETH S. WASHING-	)MEMORAN-
TON; CATHERINE CLOSE; WALTER C.	)DUM*
MAC INTOSH; RODNEY L. PATTERSON,	)
	)
Defendants-Appellees.	)
	)

Appeal from the United States District Court for the Central District of California William Matthew Byrne, Jr., District Judge, Presiding Submitted on Briefs August 5, 1988** Pasadena, California

Before: KOELSCH, FARRIS, and WIGGINS, Circuit Judges

Richard Mitchell appeals from the district court's grant of summary judgment to the defendants. The appellant brought a com-

plaint alleging employment discrimination based on age, sex and race. The complaint raised claims under 42 U.S.C. §§ 1981, 1983 and 1985; 29 U.S.C. §§ 621-34 (Age Discrimination in Employment Act) (ADEA); 42 U.S.C. §§ 2000e-2000e-17 (Equal Employment Opportunities) (Title VII); for declaratory and injunctive relief and pendent state claims. The district court found that the appellant's 1981, 1983 and 1985 claims, as well as his ADEA and Title VII claims, were barred by the statute of limitations. Alternatively, the court found that the appellant had failed to raise a genuine issue of material fact to support his allegations of discrimination.

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* This disposition is not appropriate for publication and may not be cited to or be the courts of this circuit except as provided by 9th Cir. R. 36-3.

**The panel finds this case appropriate for submission without argument pursuant to Fed. R. App. P. 34(a) and 9th Cir. R. 34-4.

The court also found that the defendant Los Angeles Community College District (district) and the individual defendants, enjoyed eleventh amendment immunity from damages or injunctive relief. Further, the court held that the plaintiff's state based constitutional and statutory claims were time barred under California law. We AFFIRM.

FACTS

The appellant, a 56 year old black male, was a teacher in various capacities in Los Angeles public schools and at various community colleges in appellee's community college district. In October, 1981, Mitchell filed applications with the district for the positions of assistant dean and dean. The district maintained a "pool" of eligible candidates for these positions at the various Los Angeles community colleges. Members of the pool were

eligible for these positions as they became open. Pool members did not have to reapply for these positions as they became available. In 1983, the appellant also applied for the position of Senior Director of Occupational and Technical Education with the district. This position was specially advertised and was not filled from a pool.

None of the application materials used by the district revealed an applicant's race to those making hiring decisions. Since 1983, these materials also do not reveal an applicant's age. Mitchell became eligible for variots asistant dean and dean positions but was never offered a position. He was not recommended for hire after he filed a discrimination claim against the district, but tte defendant responsible for not recommeoding him was unaware of his action. Only four

applicants were reviewed for the Senior Director position. An internal policy required that five people be interviewed for the position by a selection committee; but, instead of readvertising the position, the district interviewed all of the applicants including Mitchell. All members of the selection committee rated him as below average in "knowledge of the area of the position" and quali- and amount of relevant experience. The committee rated the successful candidate a white woman, as "far above average" in these and all other categories of evaluation.

PROCEEDINGS

Early in 1984, the appellant filed a complaint against the district with the U.S. Department of Education Office for Civil Rights (OCR) alleging discrimination on the basis race, sex and age in

the district's Senior Director decision. Because the complaint alleged employment discrimination, the filing with he OCR was deemed to be simultaneous filing with the Equal Employment Commission (EEOC). During the same time period, Mitchell also pursued internal remedies with the district as well as filing a charge with the State Department of Fair Employment and Housing (DFEH). The DFEH informed Mitchell that, pursuant to an agreement between the EEOC and the DFEH, it would defer its investigation to the EEOC. The EEOC, in turn, deferred its investigation to the OCR.[1/] On November 7, 1984, the

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[1] On June 17, 1985, the appellant filed another complaint with the EEOC alleging that he was rejected for the assistant dean and dean positions in retaliation for his previous complaints. This charge is still pending before EEOC. The DFEH again has deferred investigation to the EEOC and informed the appellant on July 17, 1985, the (sic) he had one year from that date to file a private civil suit in state court.

OCR issued its findings and determination. It concluded that Mitchell was not selected because he lacked the necessary qualifications for the Senior Director position and not because of his race, sex or age. The OCR also found insufficient statistical evidence to conclude that there was a pattern and practice of discrimination on the basis of sex, race or age in the district's hiring for administrative positions. On March 15, 1985, the EEOC issued a "Right to Sue" notice to Mitchell. He received it on March 19, 1985.

On July 17, 1986, Mitchell filed this action in state court. Apparently, all of the defendants except for appellee Catherine Close were properly served. The defendants removed the case to federal court. On March 19, 1987, a de-

fault was entered against Close. On April 27, 1987, the district court found good cause to set aside the default because Close was never properly served. On February 9, 1987, all defendants moved for summary judgment.

On September 30, 1987, the court granted summary judgment to all defendants on all claims. The district court found that the defendants did not discriminate against the plaintiff on the basis of race, age or sex, nor did they deprive him of due process. Relying on Wilson v. Garcia, 471 U.S. 261, 280 (1985) the court determined that a one year statute of limitations applied to Mitchell's 42 U.S.C. §§ 1981, 1983 and 1985 claims. Thus, any claims arising before July 17, 1985, were time barred. The court found these to include all claims relating to the

district's hiring decisions regarding the Senior Director position, the retaliation claims, and the claims that the district failed to properly investigate Mitchell's internal claim. The court also found that the plaintiff's ADEA and Title VII claims were barred because he failed to bring this action within 90 days of the EEOC's "Right to Sue" notice. Alternatively, the court found that the appellant had failed to make out a prima facie Title VII employment discrimination claim under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973), because the undisputed evidence showed that Mitchell was not qualified for the Senior Director position. The court also found no evidence of discrimination on the basis of age. As to the assistant dean and dean positions, the court

found no evidence that the appellant was not hired in retaliation for filing his various complaints because the person responsible for the hiring decision was unaware of them.

The court also found that the district was an agency of the state and thus enjoyed eleventh amendment immunity from Mitchell's suit in damages and his request for injunctive relief. The court further found that all the facts alleged in the plaintiff's complaint related to actions by the individual defendants in their official capacities, acting within the course and scope of their employment. Therefore, the court found that they shared the district's eleventh amendment immunity. Alternatively, as employees performing discretionary functions, the court found these defendants to possess a qualified good faith immun-

ity from the appellant's suit based on Harlow v. Fitzgerald, 457 U.S. 800, 817-19 (1982). The court held that all the plaintiff's state claims were time barred under California law. The court awarded no attorney fees to the defendants. The appellant timely appealed. We have jurisdiction under 28 U.S.C. § 1291.

DISCUSSION

A grant of summary judgment is reviewed de novo. Darrington v. Kincheloe, 783 F.2d 874, 876 (9th Cir. 1986).

I. Eleventh Amendment Immunity.

Under the eleventh amendment, agencies of the state are immune from private damage actions or suits for injunctive relief brought in federal court. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100 (1984) (eleventh amendment proscribes suit against state agen-

cies "regardless of the nature of the relief sought"); Alabama v. Pugh, 438 U.S. 781 (1978)(per curiam). To determine whether a governmental agency is an arm of the state, the following factors must be examined: whether a money judgment would be satisfied out of state funds, whether the entity performs central governmental functions, whether the entity may sue or be sued, whether the entity has the power to take property in its own name or only the name of the state, and the corporate status of the entity. Jackson v. Hayakawa, 682 F.2d 1344, 1350 (9th Cir. 1982). To determine these factors, the court looks to the way state law treats the entity. Mount Healthy City School Dist. Bd. of Educ. Doyle, 429 U.S. 274, 280 (1977); Ruthledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1349 (9th Cir. 1981), aff'd

sub nom. Kush v. Rutledge, 460 U.S. 719 (1983). California cases demonstrate that California state colleges and universities are "dependent instrumentalities of the state." Hayakawa, 682 F.2d at 1350 (citing Slivkoff v. California State Univ. and Colleges, 69 Cal. App. 3d 394, 400, 137 Cal. Rptr. 920, 924 (1977)(California state universities and colleges are subject to fulllegislative control") and Poschman v. Dumke, 31 Cal. App. 3d 932, 942, 107 Cal. Rptr. 596, 603 (1973) ("The Trustees of California State Colleges are a state agency created by the Legislature")). As the district court noted, the district budget is made up of funds received from the state's general fund pursuant to a state calculated formula. In addition, some fees charged by the district's colleges go to the state. We hold that, under California law, the

district is a state entity that possesses eleventh amendment immunity from the appellant's section 1981, 1983 and 1985 claims in damage and for injunctive relief. Likewise, the individual defendants share in the district's eleventh amendment immunity because they were sued in their official capacities. Such suits "are, in essence, actions against the governmental entity of which the officer is an agent." Hayakawa, 682 F.2d 1350; see Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 690 n.55 (1978).

42 U.S.C. § 2000e-5(f)(1) Civil Action by Commission, Attorney General, or person aggrieved) requires that an aggrieved party bring suit in court within 90 days of receipt of a "Right to Sue" notice. The 90 day requirement is mandatory and jurisdictional. Wong v. Bon Marche, 508 F.2d 1249, 1251 (9th Cir. 1975)(per

curiam). The appellant filed this suit raising these claims one year and five months after receipt of his "Right to Sue" notice, well after the 90 day period. We hold that the appellant is thus barred from raising his ADEA and Title VII claims.

III. State claims.

Cal. Civ. Proc. Code § 340(1)(West Supp. 1988) and Cal. Gov. Code § 12960 (Procedure for prevention and elimination of unlawful employment practices)(West 1980) both require that actions challenging such allegedly unlawful employment practices be brought within one year of the practice complained of. The last actions at issue by the district occurred in 1983 or 1984. The appellant brought this action in July of 1986. We hold that the appellant's state claims are thus time barred.

IV. Default.

The district court set aside the clerk of court's entry of default against appellee Close. A district court's decision to enter or set aside a default is reviewed for an abuse of discretion. Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980). The court found that Close had never been properly served by the appellant. Apparently, the appellant assumed that service on the district was sufficient to serve Close. Close, however, is not an employee of the district. Rather, she is a state employee who works for the state community college board in Sacramento. Also, Close was not represented by the same counsel as were the rest of the defendants. It was not an abuse of discretion to set aside the default on these grounds.

V. Attorneys' Fees--Cross Appeal.

The defendants moved for an award of attorneys' fees under 42 U.S.C. § 1988. The district court denied the appellant's (sic) application for attorneys' fees. Attorneys' fees decisions under section 1988 are reviewed for an abuse of discretion. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 480 (9th Cir. 1985). In a civil rights case, fees may be awarded against an unsuccessful plaintiff only if his action is "meritless in the sense that it is groundless or without foundation." Hughes v. Rowe, 449 U.S. 5, 14 (1980); Dooley v. Reiss, 736 F.2d 1392, 1396 (9th Cir.), cert. denied, 469 U.S. 1038 (1984). The appellees heatedly assert that Mitchell's cause of action is meritless and he brought it for vexatious purposes. Their contention is

cast more as a quest for sanctions under Fed. R. Civ. P. 11 than a request for attorneys' fees under section 1988. Only under exceptional cases should defendants be awarded attorneys' fees in civil rights cases. See Mitchell v. Los Angeles County Superintendent of Schools, 805 F.2d 844, 848 (9th Cir. 1986), cert. denied, 108 S. Ct. 168 (1987)(same plaintiff). Though Dr. Mitchell ultimately did not prevail in his case, we hold that the district did not abuse its discretion by denying the defendants attorneys' fees

CONCLUSION

For the reasons stated above we AFFIRM.

FILED SEP 30 1987
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY
DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD L. MITCHELL, JR., Plaintiff, v. THE BOARD OF TRUSTEES OF THE LOS ANGELES COMMUNITY COLLEGE DISTRICT, et al., Defendants.	CV 86-5105-WMB FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff's Complaint in this action is somewhat confusing as to the claims he makes and the basis for those claims. However, in general, plaintiff contends that he was the victim of race and age discrimination by defendants with re-

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

ference to his failure to be appointed to the positions of Senior Director of Occupational and Technical Education; Assistant Dean of Academic Affairs; and Assistant Dean of Occupation Education, at Los Angeles Southwest College. Plaintiff contends that he was denied due process by the defendants in their handling of his discrimination complaint. He also asserts that he was not invited for interviews for other positions because of his race and age.

Defendants have filed or joined in, motions to dismiss or, in the alternative, for summary judgment. The parties have presented documentation and declarations. The Court treats the motions as ones for summary judgment and makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Los Angeles Community College District is a California community college district operating pursuant to the laws of the State of California.

2. The Board of Trustees of the Los Angeles Community College District is a seven-member board elected by the residents of the District.

3. Dr. Leslie Koltai is the Chief Executive Officer of the District and is emplooyed by the District as its Chancellor.

4. Mr. William Spaeter was, prior to his retirement, the Vice Chancellor of the Personnel Services Division.

5. Dr. Virginia F. Mulrooney is employed by the District as Vice Chancellor of the Human Services Division.

6. Dr. Kenneth Washington was, prior to his retirement, employed by the Dis-

trict as Vice Chancellor for Educational Services.

7. Dr. Walter C. McIntosh is currently employed as the District's Senior Director of Occupational and Technical Education. Prior to his current assignment, Dr. McIntosh was President of Los Angeles Southwest College.

8. Ms. Ernestine J. Palmer was formerly employed by the District as Director, Office of Affirmative Action Programs and Services.

9. Mr. Rodney L. Patterson is currently employed as the Director, Office of Affirmative Action Programs and Services.

10. Mr. Thomas Fallo is the Vice Chancellor of Business Services for the District.

11. Mr. Richard Anderson is the Senior Director of the Personnel Operations

Branch. He has served in that Capacity since 1967. He reports directly to Dr. Mulrooney, who in turn, reports directly to the Chancellor, Dr. Koltai.

12. Mr. Anderson'a responsibilities include supervision of the District's hiring processes, including the procedures followed in hiring certificated administrators. Under his supervision, the staff opens, updates and maintains the files of applicants and the records relating to particular position vacancies.

13. The selection process for certificated administrators is generally controlled by Personnel Guide B 456. B 456 was issued on June 3, 1981 and reissued again, with amendments, on December 7, 1983 and January 29, 1986.

14. Effective July 1, 1983, the District's Board of Trustees reorganized

and renamed certificated administrative positions, as part of a plan to reduce the number of administrators in the District. Under the reorganization, administrators in the position of coordinator had their title changed to assistant dean. Assistant deans became deans, and decans became vice presidents. The labels on the files in the coordinator pool were simply changed to assistant dean.

15. Prior to December 7, 1983, the Personnel Operations branch accepted and renewed applications on a continuous basis for vice president, dean, and assistant dean. After December 7, 1983, only applications for assistant dean and dean were accepted on a continuous basis. Vice president and director openings were filled from pools created after particular job announcements.

16. The pool of applications for the assistant dean classification currently includes approximately 150 candidates, including Dr. Mitchell. The pool of applications for the dean classification includes about 110 candidates, including Dr. Mitchell.

17. None of the documents utilized by the District in any of its selection procedures requires an applicant to reveal his or her race, or, since 1983 his or her age.

18. Dr. Mitchell first filed an application for assistant dean/coordinator on October 23, 1981.

19. On October 29, 1981, Dr. (sic) Anderson's office sent evaluations forms to each of the references listed on Dr. Mitchell's application. However, only three of Dr. Mitchell's references returned the forms. Dr. Mit-

chell'(sic) then current or most recent supervisors did not return their evaluations.

20. In May, 1983, Mr. Anderson's office, as it regularly does, sent Dr. Mitchell notice that his assistant dean /coordinator application would expire on June 30, 1983 unless he completed the enclosed renewal application. The District's record of having sent this notice to Dr. Mitchell is made in the "For office use only" column of District form C699-4.

21. On August 12, 1983, the District received Dr. Mitchell's first renewal application for the assistant dean classification. Effective July 1, 1983, the District no longer maintained an eligibility pool for the position of coordinator.

22. Dr. Mitchell's renewal applica-

tion would expire June 30, 1984, if not renewed.

23. Mr. Anderson's office sent Dr. Mitchell notice of expiration and a renewal application in June, 1984. No renewal application was received from Dr. Mitchell until November 7, 1986.

24. Dr. Mitchell's failure to renew his application with Mr. Anderson's office resulted in his name not being included in the assistant dean pool for a time, thereby precluding consideration of Dr. Mitchell for any assistant dean openings occurring between June, 1984 and November, 1986.

25. Dr. Mitchell completed his initial application for Dean on October 22, 1981.

26. On October 29, 1981, Mr. Anderson's office sent evaluations to Dr. Mitchell's references. Only three

were returned. Dr. Mitchell's immediate past supervisors did not return evaluations on him. Three evaluations were returned. If any fewer had been returned, Dr. Mitchell would have been rejected from the peel.

27. In May, 1983, a renewal notice for Dean position was sent to Dr. Mitchell.

28. On August 12, 1983, Mr. Anderson's office received Dr. Mitchell's renewal application.

29. In June, 1984, Mr. Anderson's office seant a renewal notice for the position of Dean to Dr. Mitchell.

30. No renewal application was received from Dr. Mitchell until September 19, 1986.

31. In response to a District job announcement, Dr. Mitchell submitted his application for the position of

Senior Director of Occupational and Technical Education. On August 17, 1983 Mr. Anderson's office sent evaluation forms to all of Dr. Mitchell's listed references. All five responded.

32. Only four applications were received for the Senior Director of Occupational and Technical Education position. Dr. Thor and Ms. Marilyn Brock, both white females, were two of the candidates. Personnel Guide B456 requires that five people be interviewed.

33. Rather than rejecting all applications and readvertising the position, the District determined that all of the applicants would be interviewed.

34. If the position had been readvertised and if two more applications had been received, it is likely that Dr. Mitchell would not have been invited to an interview, given the poor evaluations

given by his references and his lack of relevant experience.

35. Dr. Washington, as the responsible Vice Chancellor and immediate supervisor of the Senior Director of Occupational and Technical Education, selected an interview committee. The committee consisted of Dr. Washington, Mr. Lowell J. Erickson, Mr. John McDowell, Ms. Stanley Viltz and Mr. Ted Scheer. Each committee was familiar with the District's programs in occupational and technical education, as well as the duties and responsibilities of the senior director position.

36. Each member of the selection committee is required to sign a document called "Campus Interview Committee-Members Agreement." That agreement requires each member to make his or her evaluation on the basis of the appli-

cant's ability to perform the duties and not on the basis of race, sex, or age. Each member of the committee signed this agreement.

37. Each of the applicants was interviewed by the committee on December 2, 1983.

38. Each committee member is required to complete an evaluation for each candidate interviewed.

39. Each of the committee members evaluated Dr. Mitchell as below average in the category of "Knowledge in the area of the area of the position." The evaluation completed by Stanley Viltz shows that Dr. Mitchell was not aware that the Job Training Partnership Act (JTPA) had replaced the Comprehensive Employment and Training Act (CETA). The job announcement clearly states that the successful candidate would develop and ad-

minister programs under JTPA.

40. The successful candidate, Dr. Thor, was rated "Far Above Average" in her "Knowledge in the area of position" by each member of the committee.

41. Each of the committee members evaluated Dr. Mitchell as below average in quality and amount of appropriate experience.

42. Dr. Thor was uniformly rated as "Far Above Average" in the quality and amount of appropriate experience" category.

43. Dr. Mitchell's strongest evaluation was received in the category of "Grooming and appropriate dress," where all of the committee members rated Dr. Mitchell as average or above.

44. Dr. Thor and Ms. Brock were eventually recommended to the Chancellor by the committee. Dr. Thor was recom-

mended to the Board of Trustees by the Chancellor, Dr. Koltai, and the Board appointed Dr. Thor on December 14, 1983.

45. On or about December 22, 1983, Dr. Mitchell was informed that Dr. Thor had been appointed to the position of Senior Director of Occupational and Technical Education.

46. In June, 1984, the Los Angeles Southwest College sought to fill the position of Assistant Dean, Academic Affairs. Dr. Mitchell was interviewed for the position on June 11, 1984. Dr. Mitchell was not among the top two candidates recommended by the college President, Dr. McIntosh, to the Chancellor.

47. When Dr. McIntosh referred the two highest rated candidates to the Chancellor, he had no knowledge that Dr. Mitchell had filed any employment discrimination claims against the Dis-

trict.

48. The Chancellor did not recommend either of the two finalists to the Board and, as a result, all of the candidates were rejected. Of the two finalists who were rejected, one was a black male and the other was a white male.

49. After deciding not to fill the Assistant Dean of Academic Affairs position, the duties of that position were redistributed and a new position was created -- Assistant Dean of Occupational Education

50. In October, 1984, Los Angeles Southwest College sought to fill the position of Assistant Dean of Occupational Education. Mr. Anderson's office had not received a renewal application from Dr. Mitchell for the assistant dean's pool and, as a result, Dr. Mitchell could not be considered for the position.

51. Mr. Patterson's office is responsible for the investigation of complaints alleging discrimination. He is also the affirmative action officer for the district.

52. On February 15, 1984, Mr. Patterson was informed by the United States Department of Education's Office for Civil Rights (OCR), that Dr. Mitchell had filed a complaint against the District alleging discrimination on the basis of race, color national origin and sex. The complaint was subsequently amended to include age discrimination.

53. Since the allegation in the complaint filed with OCR involved employment discrimination, the filing with OCR was deemed filing with the Equal Employment Opportunity Commission(EEOC).

54. On March 1, 1984, Mr. Patterson

received a letter from the California Department of Fair Employment and Housing (DFEH) dated February 28, 1984. This letter indicated that the DFEH was going to defer its investigation to the EEOC. This was pursuant to the work-sharing agreement between EEOC and the DFEH. In turn, the EEOC deferred its investigation to the OCR. Attached to the DFEH's February 28, 1984 letter was a copy of Dr. Mitchell's OCR complaint bearing the EEOC charge number 092843-217 and alleging age and race discrimination. The copy of the OCR charge also had a date stamp indicating receipt of the complaint by the DFEH on February 23, 1984.

55. On November 7, 1984, Mr. Patterson received the OCR's determination in Dr. Mitchell's age and race case. At page three of the "State of Findings,"

the OCR concluded that Dr. Mitchell was not selected for the position of Senior Director of Occupational and Technical Education, because of his lack of qualifications and not because of his race or sex. Further, at page four of the Findings, OCR found insufficient statistical evidence to suggest that there was a pattern and practice of discrimination on the basis of sex or race in the filling of administrative positions at the District office.

56. Ms. Deweylene Henry filed a discrimination complaint with the Office of Civil Rights relating to the 1983 hiring of Dr. Thor as the Senior Director of Occupational and Technical Education. Dr. Mitchell and Ms. Henry were both candidates for that position. The OCR found in Ms. Henry's case, as it did in Dr. Mitchell's, that there

was no discrimination on the basis of race or sex.

57. At the same time that Mr. Patterson was assisting the OCR in its investigation of Dr. Mitchell's complaint, he was also handling Dr. Mitchell's internal AB 803 complaint relating to the same allegations. The federal complaint took precedence in order to avoid duplication of effort and inconsistent findings. State regulations authorize deferral to outside employment discrimination investigations. See 22 California Administrative Code, Section 98410

58. Following the completion of the OCR investigation, the EEOC issued a "Notice of Right to Sue" to Dr. Mitchell on March 15, 1985. Mr. Patterson received a copy of the Notice on March 19, 1985. Dr. Mitchell had 90 days from receipt of the letter to commence an

action in the district court. Dr. Mitchell neither commenced a federal action within 90 days of the EEOC's Notice nor within one year of the DFEH's February 28, 1984 letter of deferral.

59. On June 25, 1985, Mr. Patterson received from the EEOC a copy of a charge that Dr. Mitchell had filed with the EEOC on June 13, 1985. This was charge No. 092850608. In this charge, Dr. Mitchell alleged that he was rejected for the positions of Assistant Dean of Academic Affairs and Assistant Dean of Occupational Education at Los Angeles Southwest College in retaliation for his having filed the previously described charges.

60. On July 22, 1985, Mr. Patterson was informed by a letter from the DFEH dated July 17, 1985 that the DFEH was going to defer investigation to the

EEOC and that Dr. Mitchell had one year from that date to file a private civil suit in state court

61. Dr. Mitchell's EEOC retaliation charge is still pending at EEOC.

62. On January 21, 1986, Mr. Patterson learned that Dr. Mitchell had filed his retaliation claim with the OCR as well as the EEOC. The OCR deferred to the EEOC.

63. The District currently employs approximately 132 certificated administrators. This population is the group eligible to serve in acting certificated administrative positions. Of this population, 69 individuals or 52.3% are white; 34 individuals or 25.8% are black and 29 individuals or 22% are other or racial minorities.

64. Since 1981, 39 of the 132 individuals appointed to probationary certi-

ficated administrative positions first served in an acting capacity. The Los Angeles Community College District is the largest college district in the state. Given the District's size and its scope of operation, many of the administrative positions are unique to the District. As a result, the required knowledge and experience needed to perform successfully can only be obtained by actually doing the job. These opportunities are made available on a basis which does not have a statistically significant relationship to one's race.

65. Of the 39 acting positions filled since 1981, eight positions went to individuals identifying themselves as black, 7 went to other minorities (self) identified) and 24 went to whites. Based on their representation in the pool of certificated administrators, one would

have expected 10 blacks to have been appointed, rather than eight; 9 other minorities, rather than 7; and only 20 whites, rather than 24.

66. Based on the numbers set forth above, Mr. Patterson calculated a chi square test for statistical significance on the issue of whether race is statistically related to the probability of a current certificated administrator receiving an acting appointment. The test rejected the conclusion that they are related.

67. The District general fund budget is made up of funds from the State of California's own general funds, of funds allocated by the state as the District's share of local property tax revenues, and of funds from miscellaneous other sources.

68. Likewise, all funds derived

from the state lottery come to the District pursuant to a formula developed and administered by the state. No funds are received directly.

69. Present state policy for community college finance, which has remained consistent since the enactment of Article XIIIA of the California Constitution in 1978, requires the state to predetermine a district's total revenue pursuant to a formula, in order to calculate the state apportionment. Thus, if local property taxes increase, or if any other source of funding increases, state general funds available to a district will decrease, so that the total revenue stays constant in accordance with the state's predetermination.

70. In fiscal year 1984-85, for the first time districts were required by

the state to charge community college students an enrollment fee. The fee is set by the state, and the state keeps the revenues from the fee by offsetting community college district apportionments by the amount of the fee.

71. With respect to the individual defendants, all acts alleged in the complaint relate to their official capacities. At all times, the defendants acts were within the course and scope of their employment.

72. Plaintiff filed this action in state (sic) on July 17, 1986.

73. Plaintiff was not discriminated against by any of the defendants on the basis of race, sex or age.

74. Plaintiff was not deprived by any defendant of due process of law.

75. The defendants did not violate any constitutional right of the plain-

tiff.

76. Any irregularities in the defenda2ts' interview or recommendation procedure did not cause plaintiff any adverse consequences.

77. Any Conclusion of Law deemed to be a Finding of Fact is hereby incorporated into these Findings of Fact.

CONCLUSIONS OF LAW

1. Any Finding of Fact deemed to be a Conclusion of Law is hereby incorporated into these Conclusions of Law.

2. A party cannot base a cause of action on direct constitutional grounds if some federal civil rights statute can provide the sought after remedy. Ward v. Caulk, 650 F.2d 1144, 1147-48 (9th Cir. 1981).

3. The statutory period for a cause of action based on section 1983 is determined by the applicable statutory

period for a personal injury cause of action. Wilson v. Garcia, 471 U.S. 261 280 (1985). California Code of Civil Procedure section 340 mandates a one year statutory period for personal injury actions.

4. Plaintiff's claims pursuant to 42 U.S.C. sections 1981 and 1983 arising before July 17, 1985 are barred by California's one year statute of limitations on personal injury causes of action. California Code of Civil Procedure section 340(3); Wilson v. Garcia 471 U.S. 261, 280 (1985) Section 1983 actions); Runyon v. McCrary, 427 U.S. 160, 179-182, (1976)(42 U.S.C. section 1981 governed by state's personal injury statute of limitations); McMillan v. Goleta Water District, 792 F.2d 14-53 (9th Cir. 1986), cert. denied, ___U.S. ___, 107 S.Ct. 1348 (1987).

5. Considering this case was filed on July 17, 1986, any injury that occurred prior to July 17, 1985 is therefore time barred. This includes all of plaintiff's claims relating to the Senior Director, Occupational and Technical Education position, the allegations of retaliation relating to the Assistant Dean positions at Los Angeles Southwest College starting June, 1984, and the District's alleging failure to properly investigate plaintiff's AB 803 complaint.

6. Plaintiff's Age Discrimination in Employmeno Act (ADEA) and Title VII claims are likewise time barred since the plaintiff failed to act within the required 90 days from the time that he received the notification of that right from the EEOC on March 15, 1985.

7. Even if the plaintiff's claims were not time barred, he has failed to

factually support his allegations of discrimination. This Court's analysis should be proceed (sic) along the lines of inquiry established for Title VII actions in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

8. A critical factor in proving a discrimination claim like the present one requires the plaintiff to prove that he is qualified for the sought after position. McDonnell Douglas, 411 U.S. at 802-03. In the present case, the undisputed evidence indicates not only was the plaintiff far less qualified for the position than the party that eventually filled the position but plaintiff was far less qualified than any of the other candidates. Plaintiff was consistently rated average at best or below average by the committee members during

his interview.

9. The District's "color blind" paper screening of applicant files is insufficient to create a prima facie case of employment discrimination with respect to this stage of defendants' hiring hiring process. See Mitchell v. Los Angeles County Superintendent of Schools, 805 F.2d 844, 846 (9th Cir. 1986).

10. In light of plaintiff's objective absence of qualifications, no evidence has been presented sufficient to create an inference that race played any part in the District's employment decisions. International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 328 (1977); Mitchell, 805 F.2d at 846.

11. Plaintiff was not as qualified for the Senior Director, Occupational and Technical Education position as the

successful candidate.

12. Plaintiff's age discrimination claim is also unsupported by the facts since there is no evidence that plaintiff's age made any difference in the decision not to appoint plaintiff. See Cancellier v. Federated Department Stores, 672 F.2d 1312, 1316 (9th Cir. 1982). The evidence indicates that the decision not to hire the plaintiff resulted from his deficient qualifications in education and expertise, and had nothing to do with his age.

13. Plaintiff alleges that the Distict failed to hire him for either of two assistant dean positions in 1984 in retaliation for the plaintiff's filing of these claims. Plaintiff was interviewed for one of the positions on June 11, 1984 but was not one of the two candidates recommended to the Chan-

cellor. Both of the recommended candidates were later rejected. Plaintiff maintains that he has met the Ruggles v. California Polytechnic State University, 797 F.2d 782-86 (9th Cir. 1986) standard for setting forth a prima facie case of retaliation in the context of a failure to hire; namely, (1) the plaintiff was engaged in protected activity; (2) the plaintiff suffered an adverse employment decision; and (3) there was a nexus between the first and second elements. In plaintiff's case, the protected activity is seeking an investigation of his claim of discrimination; and the adverse employment decision is that he was allegedly not hired for the particular positions. However, the evidence clearly establishes that as to each incident the three criteria were not satisfied. In the first

instance, in which plaintiff was not hired as assistant dean, the party making the recommendations to the Chancellor was unaware that the plaintiff had even filed his discrimination claim. In the second instance complained of, the plaintiff was not subjected to an adverse employment decision.

14. Plaintiff's ADEA and Title VII claims are barred by his failure to commence an action within the 90 days of his receipt of the right to sue letter of March 15, 1985.

15. Plaintiff's state claims raised in his retaliation charge filed with the DFEH on June 13, 1985 are barred pursuant to California Government Code Section 12960.

16. Under California law, agencies of the state are not persons for purposes of 42 U.S.C. section 1983. Pyne v.

Meese, 172 Cal. App. 3d 392, 403, 218 Cal. Rptr. 87 (1985).

17. The District, its Board of Trustees and its employees share in the State's Eleventh Amendment immunity and are thus not subject to liability pursuant to 2201-2202 or 42 U.S. sections 1981, 1983, 1985 or 2000(d). Stones v. LACCD, 572 F. Supp. 1072 (C.D. Cal.1983) aff'd on other grounds, 796 F.2d 270 (9th Cir. 1986); see Edelman v. Jordan, 415 U.S. 651 (1974); Atascedero State Hospital v. Scalon, 473 U.S. 234 (1985) (Title IX does not constitute a waiver of State's Eleventh Amendment immunity and by analogy Title VI should not do so either); Green v. Monsour, 474 U.S. 64, (1985); Peters v. Lieuallen, 746 F.2d 1390, 1392 (9th Cir. 1982)(42 U.S. section 1981 liability against a state agency) and Foreman v. G.M., 473 F. Sup-

p. 166 (E.D. Mich. 1979)(28 U.S.C. section 2201-02 do not authorize suits against states and therefore cannot be used to circumvent the Eleventh Amendment.)

18. The individual defendants acting in their official capacity also share in the State's Eleventh Amendment immunity. Stones, supra, 572 F.Supp. at 1078; Jackson v. Hayakawa, 682 F.2d 1344, 1350 (9th Cir. 1982).

19. Plaintiff is not entitled to injunctive relief. Pugh v Alabama, 438 U.S. 781, 282 (1978); Stones, 572 F.Supp. at 1078; Pennhurst State School Hospital v. Halderman, 465 U.S. 89 (1984).

20. As employees performing discretionary functions, the individual defendants are shielded from liability insofar as their "conduct does not violate clearly established statutory or consti-

tutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 817-19 (1982).

21. Qualified good faith immunity extends to all liability, not just damages and the issue should be decided on summary judgment before the burdens of discovery interfere with the officials's performance of his or her duties. Mitchell v. Forsyth, 472 U.S. 511, 535-36 (1985).

22. The employment procedures utilized by the District are not discriminatory. Stones, 572 F.Supp. at 1075-76.

23. Plaintiff's state based constitutional and statutory claims are likewise time barred, pursuant to California Code of Civil Procedure section 340 and California Government Code section 12960 which would require a complaint for these actions to be filed within one

year of its occurrence.

24. There remains oo triable issues of material fact.

25. There will be no award of attorney fees.

26. Defendants are entitled to costs.

CONCLUSION

This Court grants all defendants' motions for summary judgment as to all claims both federal and state.

DATED: Sept 29, 1987

Wm. Matthew Byrne, Jr.
United States District Judge

14092 Daily Appellate Report

Thursday, November 10, 1988

CIVIL RIGHTS

Eleventh Amendment Immunity Protects School District From Discrimination Suit

Cite as 88 Daily Journal D.A.R. 14092

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD L. MITCHELL, JR., Plaintiff-Appellant, v. LOS ANGELES COMMUNITY COLLEGE DISTRICT; LESLIE KOLTAI; VIRGINIA F. MULROONEY; KENNETH S. WASHINGTON; CATHERINE CLOSE; WALTER C. MAC INTOSH; RODNEY L. PATTERSON, Defendants-Appellees.	)Nos. 87-6553))D.C.No. CV-86-5105 WMB)ORDER AND OPINION

Appeal from the United States District Court for the Central District of California, William Matthew Byrne, Jr., District Judge, Presiding

Submitted on Briefs August 5, 1988*
Pasadena, California

Before: M. Oliver Koelsch, Jerome Farris and Charles Wiggins, Circuit

Judges.

Opinion by Judge Wiggins

COUNSEL

Richard L. Mitchell, Jr., Los Angeles, California, for the Plaintiff-Appellant.

Warren S. Kinsler, Los Angeles Community College District, and Thomas Scheerer, Deputy Attorney General, Los Angeles, California, for the Defendant-Appellee.

ORDER

The Memorandum disposition filed herein is redesignated an Opinion, authored by Circuit Judge Wiggins

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OPINION

WIGGINS, Circuit Judge:

Richard Mitchell appeals from the district court's grant of summary judgment to the defendants. The appellant brought a complaint alleging employment discrimination based on age, sex and race. The complaint raised claims under 42 U.S.C. §§ 1981, 1983 and 1985; 29 U.S.C.

§§ 621-34 (Age Discrimination in Employment Act)(ADEA); 42 U.S.C. 2000e-2000e-17 (Equal Employment Opportunities) (Title VII); for declaratory and injunctive relief and pendent state claims. The district court found that the appellant's 1981, 1983 and 1985 claims, as well as his ADEA and Title VII claims, were barred by the statute of limitations. Alternatively, the court found that the appellant had failed to raise a genuine issue of material fact to support his allegations of discrimination. The court also found that the defendant Los Angeles Community College District (district) and the individual defendants, enjoyed eleventh amendment immunity from damages or injunctive relief. Further, the court held that the plaintiff's state based constitutional and statutory claims

were time barred under California law. We AFFIRM.

FACTS

The appellant, a 56 year old black male, was a teacher in various capacities in Los Angeles public schools and at various community colleges in the appellee's community college district. In October, 1981, Mitchell filed applications with the district for the positions of assistant dean and dean. The district maintained a "pool" of eligible candidates for these positions at the various Los Angeles community colleges. Members of ohe pool were eligible for these positions as they became open. Pool members did not have to reapply for these positions as they became available. In 1983, the appellant also applied for the position of Senior Dir-

ector of Occupational and Technical Education withthe district. This position was specially advertised and was not filled from a pool.

None of the application materials used by the district revealed an applicant's race to those making hiring deciaions. Since 1983, these materials also do not reveal an applicant's age. Mitchell became eligible for various assistant dean and dean positions but was never offered a position. He was not recommended for hire after he filed a discrimination claim against the district, but the defendant responsible for not recommending him was unaware of his action. Only four applicants were reviewed for the Senior Director position. An internal policy required that five people be interviewed for the position by a selection

committee; but, instead of readvertising the position, the district interviewed all of the applicants including Mitchell. All members of the selection committee rated him as below average in "Knowledge of the area of the position" and quality and amount of relevant experience. The committee rated the successful candidate a white woman, as "far above average" in these and all other categories of evaluation.

PROCEEDINGS

Early in 1984, the appellant filed a complaint against the district with the U.S. Department of Education Office for Civil Rights (OCR) alleging discrimination on the basis of race, sex and age in the district's Senior Director decision. Because the complaint alleged employment discrimination, the filing with OCR was deemed to be simultaneous

filing with the Equal Employment Opportunity Commission (EEOC). During the same time period, Mitchell also pursued internal remedies with the district as well as filing a charge with the State Department of Fair Employment and Housing(DFEH). The DFEH informed Mitchell that, pursuant to an agreement between the EEOC and the DFEH, it would defer its investigation to the EEOC. The EEOC, inturned, deferred its investigation to the OCR.[1]

On November 7, 1984, the OCR issued its findings and determination. It concluded that Mitchell was not selected because he lacked the necessary qualification for the Senior Director position and not because of his race, sex or age. The OCR also found insufficient statistical evidence to conclude that there was a pattern and

practice of discrimination on the basis of sex, race or age in the district's hiring for administrative positions. On March 15, 1985, the EEOC issued a "Right to Sue" notice to Mitchell. He received it on March 19, 1985. On July 17, 1986, Mitchell filed this action in state court. Apparently, all of the defendants except for appellee Catherine Close were properly served. The defendants removed the case to federal court. On March 19, 1987, a default was entered against Close. On April 27, 1987, the district court found good cause to set aside the default because Close was never properly served. On February 9, all the defendants moved for summary judgment. On September 30, 1987, the court granted summary judgment to all defendants on all claims.

The district court found that the de-

fendants did not discriminate against the plaitiff on the basis of race, age or sex, nor did they deprive him of due process. Relying on Wilson v. Garcia, 471 U.S. 261, 280 (1985) the court determined that a one year statue of limitations applied to Mitchell's 42 U.S.C. §§. 1981, 1983 and 1985 claims. Thus, any claims arising before July 17, 1985, were time barred. The court found these to include all claims relating to the district's hiring decisions regarding the Senior Director position, the retaliation claims, and the claims that the district failed to properly investigate Mitchell's internal claim. The court also found that the plaintiff's ADEA and Title VII claims were barred because he failed to bring this action within 90 days of the EEOC's "Right to Sue" notice. Alternatively, the court

found that the appellant had failed to make out a prima facie case Title VII employment discrimination claim under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973), because the undisputed evidence showed that Mitchell was not qualified for the Senior Director position. The court also found no evidence of discrimination on the basis of age. As to the assistant dean and dean positions, the court found no evidence that the appellant was not hired in retaliation for filing his various complaints because the person responsible for the hiring decision was unaware of them.

The court also found that the district was an agency of the state and thus enjoyed eleventh amendment immunity from Mitchell's suit in damages and his request for injunctive relief. The

court further found that all the facts alleged in the plaintiff's complaint related to actions by the defendants in their official capacities, acting within the course and scope of their employment. Therefore, the court found that they shared the district's eleventh amendment. Alternatively, as employees performing discretionary functions, the court found ohese defendants to possess a qualified good faith immunity from the appellant's suit based on Harlow v. Fitzgerald, 457 U.S. 800, 817-19 (1982). The court held that all the plaintiff's state claims were time barred under California law. The court awarded no attorney's fees to the defendants. The appellant timely appealed. We have jurisdiction under 28 U.S.C. § 1291.

DISCUSSION

A grant of summary judgment is re-

viewed de novo, Darring v. Kincheloe, 783 F.2d 874, 876 (9th Cir. 1986).

1. Eleve th Amendment

Under the eleventh amendment, agencies of the state are immune from private damage actions or suits for injunctive relief brought in federal court. Pennhurst State School & Hosp. v. Holderman, 465 U.S. 89, 100 (1984) (eleventh amendment proscribes suit against state agencies "regardless of the nature of the relief sought"); Alabama v. Pugh, 438 U.S. 781 (1978)(per curiam). To determine whether a governmental agency is an arm of the state, the following factors must be examined: whether a money judgment would be satisfied out of state funds, whether the entity performs central governmental functions, whether the entity has the power to take property in its own name or only the name of the

state, and the corporate soatus of the entity. Jackson v. Hayakawa, 682 F.2d 1344, 1350 (9th Cir. 1982). To determine these factors, the court looks to the way state law treats the entity. Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977); Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1349 (9th Cir. 1981), aff'd. sub nom. Kush v. Rutledge, 460 U.S. 719 (1983).

California cases demonstrate that California state colleges and universities are "dependent instrumentalities of the state." Hayakawa, 682 F.2d at 1350 (citing Slivkoff v. California State Univ. ano Colleges, 69 Cal.App. 3d 394, 400, 137 Cal.Rptr. 920, 924 (1977)(California state universities colleges are subject to full legislative control") and Poschman v. Dumke, 31 Cal.App.3d 932, 942,

107 Cal.Rptr. 596, 603 (1973)(The Trustees of California State Colleges are a state agency created by the Legislature")). As the district court noted, the district's budget is made up of funds received from the state's general fund pursuant to a state calculated formula. In addition, some fees charged by the district's colleges go the state. We hold that, under California law, the district is a state entity that possesses eleventh amendment immunity from the appellant's section 1981, 1983 and 1985 claims in damages and for injunctive relief. Likewise, the individual defendants share in the district's eleventh amendment immunity because they wrre sued in their official capacities. Such suits "are in essence, actions against the governmental entity of which the officer is an agent." Hayakawa, 682 F.2d 1350; see Monell v.

New York City Dept. of Social Servc., 436 U.S. 658, 690 n.55 (1978).

II. ADEA and TITLE VII.

42 U.S.C. § 2000e-5(f)(1)(Civil action by Commission, Attorney General, or person aggrieved) requires that an aggrieved party bring suit in court within 90 days of receipt of a "Right to Sue" notice. The day day requirement is mandatory and jurisdictional. Wong v. Bon Marche, 508 F.2d 1249, 1251 (9th Cir. 1975)(per curiam). The appellant filed this suit raising these claims one year and five months after receipt of his "Right to Sue" notice, well after the 90 day period. We hold that the appellant is thus barred from raising his ADEA and Title VII claims.

III. STATE CLAIMS.

Cal. Civ. Proc. Code § 340(1) (West Supp. 1988) and Cal. Gov.Code § 12960

(Procedure for prevention and elimination of unlawful employment practices) (West 1980) both require that actions challenging such allegedly unlawful employment practices be brought within one year of the practices complained of. The last actions at issue by the district occurred in 1983 or 1984. The appellant brought this action in July of 1986. We hold that the appellant's state claims are thus time barred

IV. DEFAULT.

The district court set aside the clerk of the court's entry of default against appellee Close. A district court's decision to enter or set aside a default is reviewed for an abuse of discretion. Aldabe v. Aldabe, 616 F.2d 1089 (9th Cir. 1980). The court found that Close had never been properly served by the appellant. Apparently, the

appellant assumed that service on the district was sufficient to serve Close. Close, however, is not an employee of the district. Rather, she is a state employee who works for the state community college board in Sacramento. Also, Close was not represented by the same counsel as were the rest of the defendents. It was not an abuse of discretion to set aside the default on these grounds.

V. ATTORNEYS' FEES-CROSS APPEAL

The defendants moved for an award of attorneys' fees under 42 U.S.C. § 1988. The district court denied the appellant's (sic) application for attorneys' fees. Attorneys' fees decisions under section 1988 are reviewed for an abuse of discretion. Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); Hardin v. White Mountain Apache Tribe, 779 F.2d

476, 480 (9th Cir. 1985). In a civil rights case, fees may be awarded against an unsuccessful plaintiff only if his action is "meritless in the sense that it is groundless or without foundation." Hughes v. Rowe, 449 U.S. 5, 14 (1980); Dooley v. Reiss, 736 F.2d 1392, 1396 (9th Cir.), cert. denied, 469 U.S. 1038 (1984). The appellees heatedly assert that Mitchell's cause of action is meritless and he brought it for vexatious purposes. Their contention is cast more as a quest for sanctions under Fed.R. Civ.P. 11 than a request for attorneys' fees under section 1988. Only in exceptional cases should defendants be awarded attorneys' fees in a civil rights case. See Mitchell v. Los Angeles County Superintendent of Schools, 805 F.2d 844, 848 (9th Cir. 1986), cert. denied 108, S.Ct. 168 (1987)(same plaintiff).

Though Dr. Mitchell ultimately did not prevail in his case, we hold that the district did not abuse its discretion by denying the defendants attorneys' fees.

CONCLUSION

For the reasons stated above we AFFIRM.

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* The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed.R.App.P. 34(a).

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[1] On June 17, 1980, the appellant filed another complaint alleging that he was rejected for the assistant dean and dean positions in retaliation for his previous complaints. This charge is still pending before EEOC. The DFEH again has deferred investigation to the EEOC and informed the appellant on July 17, 1985, that he had one year from that date to file a private civil suit in state court.